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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RANDY W. J. ABELL,
Staff Sergeant, United States Army,
Petitioner,

v.

UNITED STATES ARMY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

I. WHETHER the only offenses charged against petitioner—sexual offenses committed off-post against the stepdaughters of servicemen in a civilian jurisdiction which traditionally prosecutes such crimes—are sufficiently "service-connected" to authorize a prosecution by courts-martial.[1]

II. WHETHER any cogent or compelling reasons exist for the Court of Military Appeals to depart from a detailed application of the "service connection" test set forth by this Court in *O'Callahan* and *Relford.*

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[1] *See* United States v. Solorio, 21 M.J. 251 (C.M.A. 1986). This Court has granted the petition for a writ of a certiorari on June 16, 1986. —— U.S. ——, 106 S.Ct. 2914, 91 L.Ed.2d 543. *See* note 2, *infra.*

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v.

UNITED STATES ARMY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner, Randy W. J. Abell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding on November 10, 1986.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 23 M.J. 99 (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review is unpublished, Miscellaneous Docket Number 1986/1 (A.C.M.R. 11 Mar. 1986) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on November 10, 1986, affirming the Army Court of Military Review's decision granting the government's

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appeal and reversing the trial judge's ruling dismissing the charge and specifications for lack of subject matter jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Article III § 2, Cl. 3: "The Trial of all Crimes except in Cases of Impeachment, shall be by Jury . . . ."
>
> Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be . . . deprived of life, liberty, or property, without due process of law. . . ."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

STATEMENT OF THE CASE[2]

The petitioner was charged with three specifications alleging indecent acts with two girls under the age of sixteen years in violation of Article 134, Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 934. The petitioner's trial commenced on January 13, 1986, but was terminated the following day when

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[2] This case, while procedurally and factually similar to *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986) (*see* note 1), demonstrates clearly that the military courts are continuing to build upon the erroneous precedent set forth in *Solorio* and dramatically expanding the jurisdiction of courts-martial without regard to the constitutional considerations mandated by this Court. These extensions and differences will be demonstrated in the argument, *infra*.

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the military judge granted petitioner's motion to dismiss the charge and specifications because of a lack of subject matter jurisdiction. In support of his ruling, the military judge made detailed findings of fact. *See* 23 M.J. 99-102 (Appendix A). A request for reconsideration by the convening authority to the military judge was declined on January 14, 1986.

At the time of the incidents, the petitioner and both victims were living in the same trailer court in the town of Daleville, Alabama, located near the perimeter of Fort Rucker, Alabama. The main cantonment area of the military reservation was six to eight miles from this community. Approximately eighty percent of the residents of the trailer court were servicemembers or their dependents. The trailer court was on the off-post referral list[3] maintained by the fort; a list containing over 5,000 rental units. In fact, all rental units within a five county radius of the installation were on the list except a number of rental units owned by one landlord. The military judge found that all the alleged offenses occurred off-post in the accused's trailer, and that there was no on-post contact, military or social, between the petitioner and the victims or their step-fathers.

The step-fathers of the victims were on active duty in the Army. One was stationed in Korea, the other was a member of the reserves temporarily on active duty attending flight training at Fort Rucker. The military judge found that there was no military relationship between petitioner and the victims' step-fathers,[4] nor were

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[3] Military bases often maintain a list of houses, apartments, and trailers that are available for rent from civilian landlords to assist servicemembers who are not assigned on-post housing.

[4] The Court of Military Appeals in *Solorio* noted that the accused and the victims' fathers had been assigned to the same unit at the time of some of the offenses and there was a possibility that they could be so assigned in the future. 21 M.J. at 255.

there any on-post offenses to which the off-post offenses could be pendent.[5]

The alleged offenses occurred in May and June of 1985. Both the civilian and the military officials became aware of the matter in early July 1985. The parents and step-parents of the victims told the civilian authorities that they did not wish to prosecute the petitioner. On July 3, 1985, the civilian authorities informed the petitioner that if he voluntarily sought psychological counseling, "no charges would be brought against him". The civilian authorities took no further action until October 4, 1985, when they "deferred" prosecution to the military "in light of the geographic location of the victims and their families." One of the victims and her family had been moved, pursuant to military orders, to Fort Lewis, Washington in October 1985. The other victim and her family had returned to their home in Texas following the step-father's completion of flight training.

The military judge conscientiously applied the *Relford*[6] factors to the facts of the instant case and found that court-martial jurisdiction did not exist because of a lack of service connection. In addition to applying these traditional factors, the military judge considered the effect of the alleged offenses on the morale, reputation and integrity of the installation, the impact of the offenses upon the morale of soldiers and their dependents, and the military relationship between petitioner and the servicemember step-fathers of the victims.

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[5] In *Solorio*, the Court of Military Appeals found the pendency of offenses committed on-post to be a factor to be considered in determining jurisdiction of offenses committed off-post. "[T]he pendency of the subsequent offenses for trial by general court-martial is relevant in determining service-connection." 21 M.J. at 257.

[6] *Relford v. Commandant*, 401 U.S. 355 (1971).

Pursuant to Article 62(a),[7] UCMJ, the government appealed the military judge's ruling to the Army Court of Military Review. Before that Court, petitioner argued that the military judge had properly applied the service-connection test mandated by *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, and had correctly concluded that the facts of this case did not support subject matter jurisdiction. The Army Court of Military Review, citing only *United States v. Solorio*,[8] reversed the military judge and found that the offenses alleged were service connected. On appeal, the United States Court of Military Appeals granted review of the Army Court's decision and affirmed. A motion to that Court to stay court-martial proceedings was denied. 22 M.J. 183 (C.M.A. 1986). Petitioner was tried on April 14, 1986 by a general court-martial and convicted of two specifications alleging off-post offenses in Alabama.

REASONS FOR GRANTING THE WRIT

This case is a further example of the Court of Military Appeals' decision to abandon a conscientious application of the service-connection test and its intent to continue its inexorable drive to expand courts-martial jurisdiction, and make impotent the constitutional limitations set forth by

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[7] Article 62(a), UCMJ, allows the government to appeal adverse rulings by a military judge to the Army Court of Military Review and to the Court of Military Appeals.

[8] This Honorable Court recently granted certiorari to review *United States v. Solorio*, a case involving a similar issue of courts-martial jurisdiction but involving additional factors not present in the instant case, *see* note 1. Concern was expressed in an *Amicus Curiae* brief to that case, that as a result of the *Solorio* decision military courts would disregard the requirements for determining courts-martial jurisdiction set forth in *O'Callahan* and *Relford* as in the instant case. *Amicus Curiae* brief of Defense Appellate Division, United States Army, at 2, United States v. Solorio, 106 S.Ct. 2914.

this Court in *O'Callahan* and *Relford*.[9] Indeed, while the lower court noted a plurality of the *O'Callahan-Relford* factors did not exist in the case at bar, a literal reading of these factors reveals that not a single one is present which supports military jurisdiction. *See* note 12, *infra*.

In *Solorio*, the lower court cited factors justifying an extension of military jurisdiction to off-post sex offenses committed by servicemembers against the family members of other servicemen. 21 M.J. at 256. While the lower court frankly admitted that those factors it relied on in *Solorio* to find jurisdiction were not present in the instant case, it nevertheless found that military jurisdiction existed. 23 M.J. at 103. The lower court apparently ignored the following facts, as found by the military judge, which clearly distinguish this case from *Solorio*, i.e., the offenses were committed exclusively off-post; no military or social relationship existed between the petitioner and the victims' step-fathers; and there was no evidence of any effect on the step-fathers' abilities to perform their military duty assignments.

Petitioner asks this Court to reaffirm the service-connection test as the constitutionally correct standard to be applied in determining military jurisdiction. A test balancing the constitutional rights of the individual soldier against the needs of the military properly reflects the intent of the framers of the Constitution. Courts-martial do not accord an accused the same constitutional rights as

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[9] The Court of Military Appeals began departing from the mandates of this Court in United States v. Trottier, 9 M.J. 337 (C.M.A. 1980). This trend towards the expansion of jurisdiction has continued. *See* United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983); Murry v. Haldeman, 16 M.J. 74 (C.M.A. 1983); United States v. Holman, 19 M.J. 784 (A.C.M.R. 1984), *aff'd*, 21 MJ. 149 (C.M.A. 1985), *cert. denied*, 106 S.Ct. 809 (1986); and United States v. Solorio.

Article III courts [10] and, by their very nature, are subject to a degree of command influence that may rise to an unlawful level. *See* note 16, *infra.* Moreover, the service-connection test has not caused a decrease in military discipline. In fact, military recruitment and discipline have steadily increased during the last ten years. *See Amicus Curie* brief of Defense Appellate Division, United States Army, at 20-21, *United States v. Solorio*, 106 S.Ct. 2914. The lower court's reliance on victim's rights does not justify deviating from the service connection test. Basic constitutional protections such as the right to a grand jury and a jury of one's peers should not be abrogated by the sudden shifts of concern over victim's rights, especially when there has been absolutely no showing that the military criminal justice system is any better capable of protecting those rights than a civilian court. The factors cited by the court below should not be considered when determining whether to deprive a serviceman of important constitutional rights.

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[10] Petitioner submits that 1420 or 32% of Army courts-martial in 1985 were general courts-martial, which may impose the maximum punishment impossible by law, including the death penalty. *See* Report of The Judge Advocate General of the Army, October 1, 1984 to September 30, 1985, Appendix A, and Manual for Courts-Martial, United States, 1984, and Rules for Courts-Martial 501(a)(1)(A). Furthermore, nearly two-thirds of all courts-martial convened in 1985 could adjudge a punitive discharge which carries a serious life time penalty. Report of The Judge Advocate General. United States v. Smart, 21 M.J. 15 (C.M.A. 1985) and United States v. Wheeler, 17 U.S.C.M.A. 274, 38 C.M.R. 72 (1967).

ARGUMENT

I. THE DECISION OF THE COURT BELOW IS CONTRARY TO THE MANDATES OF THIS COURT AND IS CONTINUING EVIDENCE OF A JUDICIAL CONCEPT ESPOUSING AN EVER INCREASING SCOPE OF COURTS-MARTIAL JURISDICTION OVER OFFENSES WHICH CANNOT BE SUSTAINED UPON APPLICATION OF THE SERVICE-CONNECTION TEST.

A. The Traditional "Service-Connection" Factors Clearly Demonstrate A Lack Of Military Jurisdiction In This Case.

It is well settled that "[t]he determination of service connection should be made after a particular consideration of the factors set forth in *Relford*, and the explicit constitutional values that motivated the *O'Callahan* Court." *Reed v. Middendorf*, 383 F. Supp. 488, 489-90 (C.D.Cal. 1974). The approach taken by the lower appellate courts in this case completely fails to comply with either of these constitutionally mandated steps. The lower courts did not engage in a detailed, thorough analysis of the *Relford* jurisdictional criteria, but instead predicated jurisdiction solely upon the unsubstantiated and presumed impact the offense had on the military. The record is devoid of any direct or empirical evidence that the offenses had a greater impact upon the morale of the military organization than the commission of any other serious offenses. The appellate courts virtually ignored the detailed and specific findings of the military judge which uniformly militate against subject matter jurisdiction.[11] It is equally apparent that little heed was given to the principal premise upon which the *O'Callahan* decision rests: that military jurisdiction deprives citizens of the fundamental protec-

[11] As the Court of Military Appeals stated, "[w]e note that the court below did not make any findings of fact contrary to the military judge. . ." United States v. Abell, 23 M.J. at 103.

tions guaranteed by the Bill of Rights and Article III of the Constitution, and must be limited "to the least possible power adequate to the end proposed." *O'Callahan v. Parker*, 395 U.S. at 265, *citing Toth v. Quarles*, 350 U.S. 11, 23 (1955). The unwarranted expansion of court-martial jurisdiction in this case deprived petitioner of such basic and fundamental rights as a trial free from possible coercion or influence by the executive or legislative branch, indictment by a grand jury, and the right to trial by jury of his peers. *Toth v. Quarles*, 350 U.S. at 16.

B. The Lower Court Has Erroneously Departed From The "Service-Connection" Test And Developed Its Own Ambiguous Standard To Justify Military Jurisdiction.

The Court of Military Appeals, while ostensibly accepting the military judge's findings of fact, disregarded his thorough analysis of the facts and the application of the criteria set forth by this Court. While acknowledging that its decision was not consistent with its earlier efforts to follow *O'Callahan* and *Relford*, the court rationalized that its recent decisions, "reflect an increased awareness and sensitivity to the realities of military life and operations." *United States v. Abell*, 23 M.J. at 103. However, in an effort to conclude that jurisdiction existed, the court articulated additional factors not found in *O'Callahan*, *Relford*, or *Solorio* as the basis for finding jurisdiction. Petitioner submits this reflects an unwarranted change in philosophy towards the lower court's role and ability to oversee military justice.

The court below, while specifically noting that its most recent decisions have "not departed from the principles of analysis articulated in *O'Callahan v. Parker* and *Relford v. Commandant* . . .", 23 M.J. at 103, appeared to recognize that jurisdiction could not be founded upon an application of the traditional service-connection test.

"Indeed, an argument can be made that not even a plurality of the factors exist in this case." 23 M.J. at 104. In fact, a literal reading of the factors found in *Relford* reveals that not one of the factors is present in the instant case.[12] The court then attempted to justify its holding, stating, "[h]owever, the broader purpose of these decisions and our own is to establish as a matter of fact and reason a constitutional basis for court-martial jurisdiction." *Id.* Inexplicably, the court failed to articulate a clear "constitutional basis" for finding military jurisdiction in this case.

This decision provides an insight into the lower court's gradual errosion of the *O'Callahan-Relford* standards and the concomitant incremental increases in court-martial jurisdiction. Evidently, the lower courts believe that the military criminal justice system protects the right of service-members at least as well as Article III courts, and thus the test mandated by *O'Callahan* and *Relford* may be ignored. The lower courts appear to view courts-martial as Article III courts when they in fact are not Article III courts. They are fundamentally different as a result of their historical evolution and purpose. This approach is well illustrated by the military courts' past treatment of drug cases and its current treatment of sex cases. In *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980), the court held that nearly all

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[12] The factors listed in *Relford* are: 1) the serviceman's proper absence from the base, 2) the crime's commission away from the base, 3) its commission at a place not under military control, 4) its commission within our territorial limits and not in an occupied zone of a foreign country, 5) its commission in peacetime and its being unrelated to authority stemming from the war power, 6) the absence of any connection between the defendant's military duties and the crime, 7) the victim's not being engaged in the performance of any duty relating to the military, 8) the presence and availability of a civilian court in which the case may be prosecuted, 9) the absence of any flouting of military authority, 10) the absence of any threat to a military post, 11) the absence of any violation of military property, 12) the offenses being among those traditionally prosecuted in civilian courts.

drug cases are service-connected *per se*, an approach that summarily ignored this Court's requirement to apply *O'Callahan* and *Relford*.[13] In recent opinions, it appears that the Court of Military Appeals is attempting to institute just such a *per se* rule regarding sex offenses against dependent children. See *United States v. Solorio*, 21 M.J. at 256.

C. The New "Service-Connection" Factors Claimed To Justify Military Jurisdiction In *Solorio* Do Not Exist In This Case.

In the past, military appellate courts have considered the pendency of offenses to which they could properly exercise jurisdiction as relevant in determining service-connection as to other offenses. *United States v. Lockwood*, 15 M.J. at 7. It was, in fact, a primary factor considered by the court in finding service-connection in *Solorio*. 21 M.J. at 257. In the instant case, there were no offenses separate from those traditional civilian offenses of which petitioner was convicted, over which the military could properly exercise jurisdiction under the traditional *O'Callahan-Relford* test. Thus, unlike *Solorio*, there existed no " 'military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. . . .' " *Id.* at 258.

In *Relford* this Court stressed the following as a concern relevant to courts-martial jurisdiction: "The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation, and integrity of the base itself, upon its personnel and upon the military operation and the military

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[13] *Trottier* was decided before servicemembers were allowed direct appeal to this Court. Petitioner is unaware of any case where the Court of Military Appeals has granted review of a similar drug related issue since Supreme Court review has been made available to the military accused.

mission." 401 U.S. at 367. The lower court's attempted expansion of this rationale to include the effect upon off-post victims, their families, and the ability of the petitioner to perform military duties in the future is baseless. 23 M.J. at 103-104. In *Solorio*, the evidence established that the victims and their parents were receiving psychological counseling, arguably indicating that the offenses had an impact upon their military performance. The *Solorio* Court also found "it is unlikely that Solorio and the two fathers could ever be again satisfactorily assigned together in one of the small units which is typical of the Coast Guard organization." *Solorio*, 21 M.J. at 256. In the present case, there was absolutely no evidence to indicate that the impact upon the stepfathers' duty performance would be any greater than that caused by any other offenses. In the instant case, the court's concern regarding petitioner's future ability to perform satisfactorily in a military organization, while commendable, is irrelevant to the question of jurisdiction. 23 M.J. at 103-104.[14] The possible removal of a servicemember from the military is simply not a valid factor in finding that jurisdiction exists within the military.

The lower court, in a further attempt to justify its holding in light of the clear requirements of this Court, extrapolated two of the *O'Callahan-Relford* factors i.e., the location of the offense and the failure of the civilian courts to prosecute. In *Relford*, "service-connection" was found when the crime was committed on the base. 401 U.S. at 369. However, in the instant case the court below expanded this unambiguous language to include crimes " 'near' a military post". 23 M.J. at 103. The

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[14] This reasoning is unpersuasive in that a court-martial conviction is not the exclusive method by which an unsuitable soldier can be removed from the military. *See* Dept. of Army, Reg. No. 635-200, *Personnel Separations—Enlisted Personnel* (5 July 1984).

lower court stated that the situs of the crime, across a street and railroad tracks from the reservation, was "significant" in determining service-connection. The lower court's creation of a new factor ignores the underlying rationale of why "situs" is a relevant factor in determining jurisdiction. Military commanders have the duty and responsibility for the health and safety of those who reside on the reservation they command. If there exists exclusive federal jurisdiction on the reservation, other than federal jurisdiction over certain federal crimes, courts-martial may be the only available criminal forum to try servicemembers accused of serious crimes. That situation is totally dissimilar to the one at bar. The court's unreasonable extension of military jurisdiction to civilian communities where soldiers, by happenstance reside, further adds an increasingly elastic factor which makes it highly improbable that military judges will be able to discern the bounds of courts-martial jurisdiction.

The court below also cited the failure of the civilian authorities to prosecute petitioner as a primary factor supporting military jurisdiction. Although civilian authorities knew about the offenses in early July, they took no action to bring the petitioner to trial. Petitioner was informed by the civilian authorities that if he voluntarily sought counseling no charges would be brought against him. Thus, civilian authorities were well aware of the offenses, and a civilian court, within which this type of crime is traditionally prosecuted, was available. A decision was made not to prosecute the petitioner. While the record does not specifically so state, it is a logical inference that as the step-parents of the victims did not desire to prosecute, the civilian authorities, after considering the effect on the whole family unit, including the victims, decided that the most beneficial action for all concerned was for the petitioner to receive psychological help. The fact that civilian authorities have delayed or deferred

prosecution does not rationally support the exercise of military jurisdiction over off-post, civilian-type offenses.

One of the factors *O'Callahan* specifically deals with is whether "[c]ivil courts were open." *O'Callahan*, 395 U.S. at 273. The Court in *Relford* amplified this factor and looked to "[t]he presence and availability of a civilian court. . . ." 401 U.S. at 365. Absent a clear showing of "service-connection", the import of both decisions is that military jurisdiction does not exist if civilian authorities can prosecute and the civilian courts are available to try the case. The decision of civilian authorities to require non-criminal treatment should not be construed to create courts-martial jurisdiction.

Subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." 21 C.J.S. *Courts* § 23 (1940). Criminal subject matter jurisdiction is further defined as the ability of a court "to take cognizance of an offense. . . ." 21 C.J.S. *Courts* § 19 (1940). A court's subject matter jurisdiction over an offense attaches at the time the offense is committed. Later actions of other courts can not create jurisdiction in a court. Therefore, the decision of the civilian courts not to prosecute can not cause subject matter jurisdiction to arise in the military.

The constitutional limits of military jurisdiction should not be allowed to fluctuate to accommodate the peculiar whims and changing interests of local jurisdictions. The court below recognized, but failed to fully appreciate, the sophistication with which military authorities may manipulate this factor and obtain letters of deferral from local prosecutors in an effort to gain jurisdiction where it would not otherwise exist. *Abell*, 23 M.J. at 104. In an age of restricted fiscal resources it can be expected that many small jurisdictions will "defer" prosecutions and allow the military to bear the ex-

pense of trial. The constitutional rights of a soldier should not rest upon the vicissitudes of state or county budgets.

The remaining interests cited by the court, increased awareness and sensitivity to military life and military necessity, while superficially appealing, are not pertinent to the analysis. Nothing in *O'Callahan* or *Relford* suggests that these considerations are relevant to the service-connection inquiry. The omission of these considerations from the service-connection analysis is sound. The decision to deprive soldier-citizens of their right to be tried in Article III courts should be based upon those factors that this Court determined are constitutionally required. The additional factors created by and relied upon to find service-connection reflect a fundamental misunderstanding of the mandates of this Court.

II. THE CURRENT MILITARY JUSTICE SYSTEM FAILS TO PROVIDE THE SAFEGUARDS AFFORDED BY ARTICLE III COURTS AND THERE HAVE BEEN NO SIGNIFICANT CHANGES IN MILITARY OR CIVILIAN SOCIETY NECESSITATING THE OVERRULING OR LIMITING OF *O'CALLAHAN* AND *RELFORD*.

Some improvements have taken place in the military justice system since O'Callahan was decided;[15] however, the military justice system does not, and perhaps cannot provide the two essential safeguards considered most significant by this Court in *O'Callahan*; grand jury indictment and trial by a jury of one's peers. Moreover, unlike Article III courts, the presiding officer in a court-martial is not a judge whose "objectivity and independence are

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[15] Most of the improvements were accomplished by the passage of 'command influence.'" Reid v. Covert, 354 U.S. 1, 36 (1957). 1335. These changes were apparently not considered significant enough by this Court to overrule *O'Callahan* when *Schlesinger v. Councilman*, 420 U.S. 738 (1975), was decided seven years after the Act was passed into law.

protected by tenure and undiminishable salary and nurtured by the judicial tradition. . . ." *O'Callahan v. Parker*, 395 U.S. at 264.

Commanders who tamper with the delicate balance so vital to the fair administration of criminal justice continue to plague the military justice system despite repeated efforts to eradicate the problem.[16] As this Court so aptly stated, "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal court." *Toth v. Quarles*, 350 U.S. at 17.

The interests the military seeks to vindicate in its courtrooms remain substantially unchanged since the *O'Callahan* decision. In the ensuing years since that decision there has been no dramatic lessening in the capability or interest of civilian jurisdictions in prosecuting and punishing criminals. Notwithstanding the conclusion of the court below, the military judicial system is no better equipped to protect the rights of victims than state and federal courts. The expansive approach the Court of Military Appeals has taken toward military jurisdiction

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[16] Military courts "have always been subject to varying degrees of 'command influence.'" Reid v. Covert, 354 U.S. 1, 36 (1957). Since *O'Callahan* was decided, federal and military courts have been confronted with recurring instances of unlawful command influence. *See generally* Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971); United States v. Brice, 19 M.J. 170 (C.M.A. 1985); United States v. Rosser, 6 M.J. 267 (C.M.A. 1979). These attempts to impermissibly influence trials call into question the integrity of the military judicial system. The issue of unlawful command influence of military commanders upon the integrity of the military judicial system is again being litigated in military appellate courts. See e.g., United States v. Yslava, 18 M.J. 670 (A.C.M.R. 1984), *pet. granted*, 19 M.J. 281 (C.M.A. 1985); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985), *pet. granted*, 22 M.J. 100 (C.M.A. 1986); and United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), *pet. for cert. filed*, —— U.S.L.W. —— (U.S. Nov. 21, 1986) (No. 86-826).

in this and other recent cases cannot logically be justified by significant developments in military or civilian society. There is simply no cogent or compelling reason for the courts below to depart from the decisions of this Court holding that military courts are inferior to civilian courts and should be used only when required by military necessity. *See generally Amicus Curiae* brief by Defense Appellate Division, at 11-12, *United States v. Solorio.*

III. THE DECISION OF THE MILITARY APPELLATE COURTS TO EXERCISE JURISDICTION, WHERE PREVIOUSLY THEY HAVE HELD THAT NO MILITARY JURISDICTION EXISTED, DEPRIVED THE PETITIONER OF DUE PROCESS.

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court held that the new construction of a statute and retroactive application to conduct prior to that construction violated the due process clause of the Constitution. Thus, a statute or a prior court decision cannot be construed to criminalize conduct previously held not to be prohibited and then be applied to the very case in which the new construction was announced. A court cannot "make a federal crime out of acts of a defendant which prior to that time had not been federal crimes, but acts punishable under state law." *Woxberg v. United States*, 329 F.2d 284, 293 (9th Cir. 1964).

The Court of Military Appeals violated petitioner's due process rights when it abandoned its historical reliance on the *O'Callahan-Relford* test and expanded the scope of military jurisdiction to encompass cases where it previously could not reach. At the time of petitioner's alleged offenses military law clearly forbade jurisdiction over off-post sex offenses. *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969) (*O'Callahan* prohibts the exercise of military jurisdiction over off-post sex offenses against a daughter of a fellow serviceman); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R.

322 (1969) ("service-connection test" allows prosecution for on-post acts of sodomy but not for acts committed off-post); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969) (although a servicemember met another servicemember's daughter on-post, *O'Callahan* prohibits military prosecution for off-post carnal knowledge with the daughter). If, when, the alleged acts occurred in the instant case, the traditional test for jurisdiction had been applied in light of court precedent, the military could not have prosecuted the petitioner.[17] Prosecution of petitioner under a new standard for jurisdiction violated his due process rights and requires reversal.

IV. THE ISSUE IN THIS CASE IS SUBSTANTIAL AND MERITS THE INTERVENTION OF THIS COURT.

The issue in this case is significant and necessitates this Court's intervention at this interlocutory stage of petitioner's court-martial. The issue presented was fully litigated at trial and at both the Army Court of Military Review and the Court of Military Appeals prior to their decisions being rendered. The petitioner has exhausted his military remedies and will suffer serious harm if this Court allows the decision below to stand. The right of a military accused to appeal to this Court is completely dependent on the Court of Military Appeal's exercise of its discretionary review powers.[18] The petitioner could be deprived of an opportunity to present the significant issues in this case to this Court for appropriate resolution at a later stage if the court below denies the petition for grant of review.[19] Moreover, denial of certiorari will have

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[17] Petitioner's alleged offenses occurred prior to the lower court's decision in *Solorio*.

[18] 10 U.S.C. § 867(h)(1) (Supp. III 1985).

[19] If no other issue exists in the case, it is quite possible that the court below will not exercise its discretionary review power because it has previously considered the jurisdictional issue. Fur-

consequences which transcend this case. The expansive view painted by *Solorio* and furthered in this case, sets a dangerous precedent which will discourage military courts of review and military trial judges from making the constitutionally required detailed analysis of the *Relford* factors to "the precise set of facts in which the offense has occurred." *Schlesinger v. Councilman*, 420 U.S. at 760.[20] Thus, numerous other servicemen will face a risk of being improperly subjected to court-martial prosecution if the decision is allowed to stand.

CONCLUSION

The decision in this case constitutes an unwarranted and unconstitutional extension of court-martial jurisdiction which transcends the limits set forth by the Court in *O'Callahan* and *Relford*. Petitioner's offenses are not sufficiently service-connected to meet the *O'Callahan-Relford* guidelines and, accordingly, the exercise of military jurisdiction in this case was constitutionally impermissible.

The Court's decision in *O'Callahan* strikes an appropriate balance between the competing interest of the military in ensuring discipline over its soldiers, and the necessity of protecting the constitutional rights of American citizens in uniform. The military justice system is considerably different from the civilian court system and does not provde certain fundamental constitutional rights to the accused. The *O'Callahan* decision correctly interprets the Constitution, rests on sound policy and rationale and sets forth a workable, realistic standard

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ther, if the court grants on an unrelated issue, the petitioner may be precluded from litigating the jurisdiction issue.

[20] Indeed, this has already taken place in one case where the Army Court of Military Review stated that in light of *Solorio*, "a detailed application of the *O'Callahan* and *Relford* factors is unnecessary to resolve the jurisdictional issue." United States v. Stover, SPCM 21611, slip op. at 3 (A.C.M.R. 26 Feb. 1986) (unpub.) (Appendix C).

for determining the appropriate sphere of military jurisdiction. There exists no sound or compelling reason to modify the standards set forth seventeen years ago. Indeed, the Court should take this opportunity to reaffirm the continued vitality of *O'Callahan* and the principle that soldiers will be afforded their constitutional rights and trial by civilian courts for offenses which are not service connected.

Accordingly, the lower court should be reversed and the charges dismissed.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 54649
CMR Misc. No. 1986/1

UNITED STATES,
Appellee,

v.

RANDY W.J. ABELL, Staff Sergeant,
Appellant.

Nov. 10, 1986

For Appellant: *Captain David W. Sorensen* (argued); *Colonel Brooks B. LaGrua, Lieutenant Colonel Paul J. Luedtke,* and *Major Eric T. Franzen* (on brief); *Lieutenant Colonel William P. Heaston* and *Captain Annamary Sullivan.*

For Appellee: *Captain Robert R. Long, Jr.* (argued); *Colonel James Kucera, Lieutenant Colonel Joseph A. Rehyansky, Lieutenant Colonel Gary F. Roberson,* and *Lieutenant Colonel Adrian J. Gravelle* (on brief); *Colonel Norman G. Cooper.*

OPINION OF THE COURT

SULLIVAN, Judge:

Appellant was charged with three specifications alleging indecent acts with children under sixteen years in violation of Article 134, Unform Code of Military Jus-

tice, 10 U.S.C. § 934. On January 13, 1986, appellant's trial began but it was terminated the next day by the military judge. He granted a defense motion to dismiss the charges because of a lack of subject-matter jurisdiction.

After the military judge denied a request from the convening authority to reconsider his decision, the Government appealed his dismissal ruling to the United States Army Court of Military Review in accordance with Article 62, UCMJ, 10 U.S.C. § 862. On March 11, 1986, that court held the military judge had erred, vacated his ruling, and returned the record of trial to him. Appellant, on March 13, 1986, petitioned this Court to review the decision of the Court of Military Review. We granted review on June 2, 1986, and heard oral arguments on June 26, 1986.

Prior to our grant of review, this Court denied appellant's motion to stay court-martial proceedings. On April 11, 1986, he was tried by general court-martial at Fort Benning, Georgia. Pursuant to his pleas, appellant was found guilty of the three specifications noted above. The military judge sentenced him to a dishonorable discharge, confinement for 2 and ½ years, total forfeitures, and reduction to E-1. The action of the convening authority and the Court of Military Review have not yet been reported to this Court.

The military judge who dismissed these charges made specific findings of facts and articulated his reasons for granting appellant's motion:

> The following are the essential facts I considered in reaching by decision on subject matter jurisdiction:
>
> 1) At the time of the alleged offenses, Sergeant Abell, the accused, was on active duty with B Com-

pany, 1st Battalion, 1st Aviation Brigade, Fort Rucker, Alabama.

2) The accused was drawing BAQ and resided off-post with his family in a trailer at the Deer Run Estates Trailer Court in Daleville, Alabama. This trailer court is not on military property but is adjacent to Fort Rucker, separated by a railroad track. However, the main cantonment area of Fort Rucker is six to eight miles from the trailer park.

3) The alleged victims are dependents of soldiers and were residing in the same trailer court as the accused.

4) The alleged victims were friends of the accused's daughter and were permitted to visit with her in the accused's trailer.

5) All the alleged offenses occurred in the accused's trailer.

6) A significant portion of the population of the Deer Run Estates Trailer Court, approximately eighty percent, consisted of soldiers and their dependents. The trailer court is on the offpost referral list maintained by Fort Rucker and this list contains over 5,000 units.

7) There were no facts presented showing any contact or activity of any kind between the accused and the alleged victims or their military fathers occurring on Fort Rucker.

8) The offenses in Specifications 1 and 2 allegedly occurred between 1 June 1985 and 1 July 1985. The offense in Specification 3 allegedly occurred between 1 May 1985 and 1 July 1985.

9) The alleged offenses were reported to civilian authorities on 1 July 1985. The parents of the children informed civilian authorities on 2 July

1985, they did not desire to prosecute. On 3 July 1985, Captain Ford, Dale County Sheriff's Department, told the accused if he voluntarily sought psychological counselling, "no charges would be brought against him."

10) Military police investigators first became aware of the matter in early July 1985 when civilian law enforcement agents informed them in the routine course of business.

11) The assistant district attorney for Dale County Alabama "deferred" prosecution on 4 October 1985 "in light of the geographic location of the victims and their families."

12) CID agents took sworn statements from Miss [W] on 25 August 1985 and Miss [Q] on 8 October.

13) [K][W] and her family moved to Fort Lewis, Washington, pursuant to PCS orders in October 1985.

14) [B][Q] and her family moved to Texas in the early part of September 1985.

15) Court-martial charges against the accused were preferred on 7 October 1985.

16) An Article 32 investigation was conducted on 4 November 1985 and charges referred to a general court-martial on 25 November 1985.

17) The alleged victims did not appear at the Article 32 investigation.

18) The facts do not reflect any onpost offenses to which the offpost offenses could be "pendent."

This is my ruling:

In my opinion, it is a reasonable and logical assumption that the commission of a series of indecent acts by a soldier on the children of other soldiers

in his quarters located adjacent to a military installation has a direct, clear and measurable impact on the morale, reputation and integrity of the installation. I believe that it is also reasonable to assume the morale of soldiers and their dependents, particularly those living in the same housing area as an alleged offender would suffer even more if the appropriate civilian or military authorities did not take some action. It is apparent to me that civilian authorities never intended to prosecute Sergeant Abell. In reading the appropriate Army Court of Military Review decisions and in recalling some of my own decisions as a military judge, which I certainly cannot ignore, I have noted a reluctance on the part of the Army to "expand" military jurisdiction over "sexual offenses" committed by a soldier against other soldiers or their dependents offpost unless the government could show some "activity" or "contact" occurring on the military installation prior to commission of the offenses offpost. I specifically recall a case I tried less than eight months ago. The facts reflect a female trainee heard about a party being held in a motel approximately one mile from the post. She did not have an offpost pass but decided to try and find the party. She failed to locate any party but did see what she thought was a familiar name on the door of one of the rooms in the motel. She knocked on the door and two male soldiers answered. After entering, she met the accused, another E1, for the first time. They were not members of the same unit. The female trainee complained to military authorities the next day that she had been raped by the accused in the motel. Civilian authorities were notified. They arrested the accused and put him in pretrial confinement. The accused was released from pretrial confinement after two days. Civilian authorities investigated the case but later "waived" jurisdiction to the military. The civilian authorities stated they would take the case back

> if the military did not prosecute. The case was referred to general court-martial and I ruled "no service connection" and dismissed the charge. Government appellate division would not "permit" the installation to appeal my decision. The facts in this case fail to reveal any military relationship between the accused and the military fathers of the two victims (for example, superior/subordinate relationship, members of the same unit. performance of duty together or associating socially on post.) [K][W]'s stepfather was stationed in Korea while [B][J][Q]'s stepfather was attending flight training at Fort Rucker. The accused was a member of a different unit. The facts also fail to reveal any "contact" or "activity" between the accused and the two alleged victims on post. There were no onpost offenses to which the offpost offenses could be "pendent." After considering all the facts, it is my determination that the military does not have subject matter jurisdiction. It is also my ruling that the government failed to allege the necessary jurisdictional factors in the specifications. I do not consider the words, "near Fort Rucker, Alabama," as the government alleged to be sufficient. All specifications and the charge are dismissed.

The Court of Military Review reviewed this ruling, reversed the military judge, and found jurisdiction. It stated:

> Appellee was arraigned at a general court-martial at Fort Rucker, Alabama, on three specifications alleging indecent acts with children under the age of 16 years, violations of Article 134, UCMJ. The facts show, *inter alia*, the alleged offenses occurred in appellee's trailer at a trailer court in Daleville, Alabama. The trailer court is located adjacent to Fort Rucker, separated from the installation by a railroad

track, but six to eight miles from the main cantonment. Each of the alleged victims were dependents of soldiers and resided in the same trailer court as did the accused. Approximately 80 percent of the residents of this trailer court consisted of soldliers and their dependents. No evidence was presented, however, showing any contact or activity between the appellee and the alleged victims or their military fathers occurring on Fort Rucker.

Having reviewed the record and carefully considered briefs filed by both the government and the appellee, we conclude that the offenses alleged are "service connected" and that the military judge erred by dismissing them for lack of subject matter jurisdiction. *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986).

Unpublished opinion at 1-2.

I

SCOPE OF REVIEW

This case is before this Court in accordance with Articles 62(b) and 67(b)(3), UCMJ, 10 U.S.C. § 862(b) and 867(b)(3), respectively. *See United States v. Tucker*, 20 M.J. 52 (C.M.A.1985); *see also* R.C.M. 908(c)(3), Manual for Courts-Martial, United States, 1984. We note that the court below did not make any findings of fact contrary to the military judge or otherwise violate Article 62. *Cf. United States v. Burris*, 21 M.J. 140, 143-44 (C.M.A.1985). Moreover, that court did not identify any particular error made by the military judge in reaching his conclusion that the charged offenses were not service-connected. *See United States v. Howard*, 20 M.J. 353 (C.M.A.1985); *United States v. Solorio*, 21 M.J. 512, 519-20 (C.G.C.M.R.1985). Apparently, it accepted the findings of fact made by the military judge but reached a different conclusion with respect to service-connection.

In this context, a question arises as to the propriety of the court below substituting its judgment for that of the military judge on the issue of service-connection. *See United States v. Burris, supra* at 144. For the reasons stated below, we hold that a *de novo* ad hoc judgment by the Court of Military Review on the issue of service-connection is within the scope of Article 62, and our review of such a judgment may be equally as broad.

It is well established that the question of service-connection is constitutional in nature. *Relford v. Commandant*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971); *O'Callhan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969). The Supreme Court, however, has defined its constitutional concern in practical terms. This "issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts." *Schlesinger v. Councilman*, 420 U.S. 738, 760, 95 S.Ct. 1300, 1314, 43 L.E.2d 591 (1975). Like other constitutional questions similarly framed, it calls first for fact-finding and then a legal conclusion which is subject to full review by appellate courts. *See United States v. Burris, supra* at 144 n.8; *United States v. Middleton*, 10 M.J. 123 (C.M.A.1981). Moreover, the Supreme Court has expressly recognized the relevant, indeed indispensable, role that the judgments of military courts and this Court can play in the final resolution of this particular constitutional question. *See Schlesinger v. Councilman, supra.* In this context, the practice of this Court and the various Courts of Military Review on direct review has been to analyze *de novo* the facts of each case in light of Supreme Court precedent. We see no reason why the same scope of legal review is not likewise appropriate for government appeals under Article 62. *See United States*

v. Singleton, 702 F.2d 1159, 1162-63 (D.C.Cir.1983); *United States v. Steed*, 674 F.2d 284 (4th Cir.) (en banc), *cert. denied*, 459 U.S. 829, 103 S.Ct. 67, 74 L.Ed. 2d 68 (1982).

II

The next question we must address is whether the facts as found by the military judge were sufficient to establish the service-connection of the charged offenses. The military judge articulated his rationale for concluding that they were not. The Court of Military Review, relying on *United States v. Solorio*, 21 M.J. 251 (C.M.A.1986),* a decision not published at the time the motion was decided at trial, reached a contrary conclusion. Examination of the facts of this case in light of *Relford v. Commandant*, *supra*, lead us to conclude that these offenses were service-connected.

The first point we make in resolving the issue of service-connection is that this Court in its most recent decisions has not departed from the principles of analysis articulated in *O'Callahan v. Parker* and *Relford v. Commandant*, both *supra*. *See United States v. Scott*, 21 M.J. 345 (C.M.A.1986); *United States v. Solorio*, *supra*. The accused's status as a servicemember is not sufficient in and of itself to confer jurisdiction over all his offenses no matter where and when committed. However, these recent decisions which have overruled earlier precedent from our Court do reflect an increased awareness and sensitivity to the realities of military life and operations. *See Noyd v. Bond*, 395 U.S. 683, 695, 89 S.Ct. 1876, 1883, 23 L.Ed.2d 631 (1969); *United States v. Trottier*, 9 M.J. 337 (C.M.A.1980). Accordingly, we reject appellant's initial contention that the Court of Military Review's reliance on our decision in *United States v. Solorio*, *supra*, was erroneous on this basis.

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* The Supreme Court granted certiorari in this case on June 16, 1986. —— U.S. ——, 106 S.Ct. 2914, 91 L.Ed.2d 543.

The second point we make in this regard is that neither *United States v. Scott* nor *United States v. Solorio*, both *supra*, dictate that appellant's offenses were service-connected. It is true that in each case we considered sexual abuse of a child who is a military dependent by a servicemember, all facts which can be found in appellant's case. *See Relford v. Commandant, supra.* However, in *Solorio*, a military relationship existed between the accused and the parents of the victim and in *Scott*, the accused was an officer. Neither factor exists in appellant's case. Nevertheless, we are convinced that other facts in this case, noted by the Court of Military Review, established that these offenses were service-connected.

A significant fact suggesting service-connection is the situs of the crimes in a housing area immediately adjacent to Fort Rucker. This trailer park was not property of the United States, but it was on the command referral list for off-post housing and 80% of the residents were military members and their dependents. The Supreme Court in both *O'Callahan v. Parker, supra*, 395 U.S. at 274 n. 19, 89 S.Ct. at 1691 n. 19, and in *Relford v. Commandant, supra*, 401 U.S. at 368, 91 S.Ct. at 657, recognized the impact crimes committed by servicemembers against civilians " 'near' a military post" may have on military relations and military discipline. *See United States v. Scott, supra* at 347; *United States v. Lockwood*, 15 M.J. 1, 9 (C.M.A.1983). Accordingly, the more narrow "on post" approach of the military judge was unnecessarily restrictive.

In addition, we note that state authorities deferred prosecution on October 4, 1985, "[i]n light of the geographic locations of the victims and their families." In fact the families of both victims had moved to different states, Washington and Texas, as a result of regularly scheduled military orders or release from active duty. While *O'Callahan v. Parker, supra*, 395 U.S. at 273, 89 S.Ct. at 1691, indicates that service-connection may not

exist where civil courts are open, *Relford v. Commandant, supra*, suggests a contrary inference where these courts are not willing or readily available for prosecution. *Id.* 401 U.S. at 367-68, 91 S.Ct. at 656-57. Such an inference exists in this case where there is no evidence that military authorities intentionally contributed to this civilian decision not to prosecute. Initial deference to civilian authorities in making this decision cannot reasonably be equated to a determination by the military that the offenses are not service-connected.

A third factor we may consider is the adverse impact the crimes may have on the military mission. *See Relford v. Commandant, supra* at 367-68, 91 S.Ct. at 656-67; *United States v. Trottier, supra.* Sexual abuse of a child by a servicemember raises serious problems concerning that person's future performance in a military organization. *See United States v. Solorio, supra* at 256. More importantly, the impact of such crimes on the military performance of the parents of the victim, here an active-duty soldier serving overseas and a reservist on active duty for training, cannot be ignored. A breach of trust among soldiers is clearly deleterious to military morale and cohesiveness, and the military judge expressly recognized that the charged offenses constituted such a breach in the present case.

In conclusion, we note that all the factors indicating service-connection which are mentioned in *Relford v. Commandant*, and *O'Callahan v. Parker*, both *supra*, are not present in this case. Indeed, an argument can be made that not even a plurality of the factors exist in this case. However, the broader purpose of these decisions and our own is to establish as a matter of fact and reason a constitutional basis for court-martial jurisdiction. *See Schlesinger v. Councilman, supra.* A considered judgment, not mathematical calibration, is required. Although the price of service to one's country is high, these decisions do not dictate that it further include the unreason-

able exposure of a soldier's family to unsanctioned crimes committed within the military community by fellow servicemembers. Accordingly, for all the reasons stated above, we conclude these offenses were service-connected.

The decision of the United States Army Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

COX, Judge (concurring):

I concur without reservation. I write only to emphasize that modern strategic command policy for the maintenance of a strong national defense recognizes that the welfare of the military member's family is of vital importance in maintaining an armed force of good morale and discipline. Protection of a servicemember's family against crimes by another member is of vital importance, perhaps equal to or greater than that of protecting a military member from crime.

As the Honorable Caspar W. Weinberger, Secretary of Defense, so aptly stated in his remarks on the occasion of the retirement of Admiral James D. Watkins, the Chief of Naval Operations, on June 30, 1986:

> Successful military and naval careers are not built by individuals, but by families—families dedicated to America's defense—families willing to make sacrifices on behalf of our nation.
>
> * * * *
>
> They have endured the relentless call of duty—the separation, uncertainty, and loneliness that is so well known by military families whose loved ones have willingly sailed in harm's way for the welfare of the nation.

APPENDIX B

UNITED STATES ARMY COURT OF
MILITARY REVIEW

Before
YAWN, WILLIAMS, and KENNETT
Appellate Military Judges

Miscellaneous Docket No. 1986/1

UNITED STATES,
Appellant

v.

STAFF SERGEANT RANDY W. J. ABELL,
516-72-8041, United States Army,
Appellee

U.S. Army Aviation Center and Fort Rucker

S. L. Trail, Military Judge

For Appellant: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravell, JAGC, Lieutenant Colonel Joseph A. Rehyansky, JAGC (on brief).

For Appellee: Colonel Brooks B. La Grua, JAGC, Lieutenant Colonel William P. Heaston, JAGC, Major Eric T.

Franzen, JAGC, Captain David W. Sorensen, JAGC (on brief).

11 March 1986

MEMORANDUM OPINION

Per Curiam:

Pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (Supp. I 1983), and in accordance with Rule for Courts-Martial 908, Manual for Courts-Martial, United States, 1984, the government appeals the trial judge's ruling that the military lacks subject matter jurisdiction over the offenses alleged in the case.

Appellee was arraigned at a general court-martial at Fort Rucker, Alabama, on three specifications alleging indecent acts with children under the age of 16 years, violations of Article 134, UCMJ. The facts show, *inter alia*, the alleged offenses occurred in appellee's trailer at a trailer court in Daleville, Alabama. The trailer court is located adjacent to Fort Rucker, separated from the installation by a railroad track, but six to eight miles from the main cantonment. Each of the alleged victims were dependents of soldiers and resided in the same trailer court as did the accused. Approximately 80 percent of the residents of this trailer court consisted of soldiers and their dependents. No evidence was presented, however, showing any contact or activity between the appellee and the alleged victims or their military fathers occurring on Fort Rucker.

Having reviewed the record and carefully considered briefs filed by both the government and the appellee, we conclude that the offenses alleged are "service connected" and that the military judge erred by dismissing them for

lack of subject matter jurisdiction. *United States v. Solorio*, 21 M.J. 251 (CMA 1986).

The appeal of the United States pursuant to Article 62, UCMJ, is granted. Accordingly, the ruling of the military judge dismissing the charge and specifications is vacated, and the record will be returned to the military judge for action not inconsistent with this opinion.

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

APPENDIX C

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before
RABY, CARMICHAEL, and ROBBLEE
Appellate Military Judges

SPCM 21611

UNITED STATES,
Appellee

v.

PRIVATE (E-2) FLOYD F. STOVER,
378-84-3384, United States Army,
Appellant

5th Infantry Division (Mechanized) and Fort Polk

A. J. Bonfanti, Military Judge

For Appellant: Lieutenant Colonel Arthur L. Hunt, JAGC, Captain Martin B. Healy, JAGC, Captain Pamela G. Montgomery, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Granvelle, JAGC, Major Byron J. Braun, JAGC, Captain John F. Burnette, JAGC (on brief).

26 February 1986

MEMORANDUM OPINION

CARMICHAEL, Judge:

Pursuant to his pleas, appellant was convicted of negligently destroying a military vehicle, operating the same vehicle in a reckless manner, and assaulting another servicemember, in violation of Articles 108, 111, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 908, 911, and 928 (1982), respectively. His sentence to a bad conduct discharge, four months confinement, forfeiture of $400.00 pay per month for six months, and reduction to Private (E-1) was appproved by the convening authority.

Appellant makes the same arguments before this court that he advanced at trial. First, he contends that the offenses of destroying a military vehicle and operating the same vehicle in a reckless manner are multiplicious for findings. Second, he challenges his assault conviction on the theory that it is not service connected, and thus not subject to court-martial jurisdiction. We find both arguments unpersuasive.

At trial the military judge ruled that appellant's reckless operation and subsequent destruction of a military vehicle were properly charged as separate offenses and were not multiplicious for findings. He did, however, treat the two offenses as multiplicious for sentencing. We agree with the judge's rulings. Neither of the charged offenses is a lesser offense of the other; each alleges an aggravating circumstance which is not a necessary element of the other and is not alleged in the other; and each violates a different societal norm. *See United States v. Williams*, 19 M.J. 959 (ACMR 1985) (drunk driving offense including aggravating circumstances not multiplicious for findings with offense of negligent destruction of military property despite unit of time and place); *see also United States v. DiBello*, 17 M.J. 77 (CMA 1983) (unauthorized absence of extended duration not multi-

plicious for findings with breach of restriction because extended duration sufficient to make absence separate and distinct).

Appellant contended at his trial and does again before this court that the military lacked subject matter jurisdiction over the aggravated assault offense of which he was convicted. The offense occurred at a civilian bar approximately ten miles from the post where appellant was stationed. The victim of the assault was another servicemember. At the time of the assault both appellant and the victim were dressed in civilian clothes. The bar was frequented by servicemembers during nonduty hours, and numerous servicemembers were present when appellant physically attacked the victim. Although appellant did not know the victim prior to assaulting him, he had heard that the victim was a servicemember. Also, he believed the victim to be a servicemember because of his short haircut.

If a military accused commits an offense beyond the boundaries of the military enclave, then a court-martial's subject matter jurisdiction over that offense is dependent on a showing that it is service connected. *Relford v. Commandant*, 401 U.S. 355 (1971); *O'Callahan v. Parker*, 395 U.S. 258 (1969). Whether or not a particular off-post offense is service connected must be determined on a case-by-case basis, applying the factors set forth by the United States Supreme Court in *O'Callahan* and *Relford*. In applying these factors, we are guided by the words of Chief Judge Everett of the United States Court of Military Appeals:

> However, as we made clear in *United States v. Trottier*, 9 M.J. 337 (CMA 1980), which concerned off-base drug activity, some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience.
>
> In so holding, we were not trying to rewrite the Supreme Court's opinion in *O'Callahan*. Instead, we

> sought to apply *O'Callahan*—as amplified by *Relford* —to conditions as they now exist. *Our premise was that O'Callahan permitted us to consider later developments in the military community and in the society at large and to take into account any new information that might bear on service-connection.*

United States v. Solorio, 21 M.J. 251, 254 (CMA 1986) (footnote omitted) (emphasis added).

Appellant committed an aggravated assault upon an individual whom he believed to be a servicemember. He struck the victim with his fists, kicked him, and struck him with a beer bottle. The injuries that he inflicted resulted in the victim being kept in a military hospital for two days and being absent from his duty station for one half a day. Other servicemembers who were present at the civilian bar when the assault occurred knew that appellant and the victim were both servicemembers. This knowledge, as well as widespread knowledge of the incident on post, served to make appellant an "outcast" in his squad, platoon, and company. He was ostracized by other servicemembers in his unit, several of whom apparently wanted to avenge the victim.[1] Appellant's misconduct generated command interest, and an administrative investigation under Army Regulation 15-6[1] was directed. One of its purposes, according to a senior noncommissioned officer from appellant's unit, was to determine "why we [unit leaders] don't know what the soldiers are doing after duty hours."

Based on the facts before us, a detailed application of the *O'Callahan* and *Relford* factors is unnecessary. We find that the evidence conclusively establishes that appellant's misconduct had a significant and highly detrimental impact on military discipline, unit morale, and

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[1] Army Regulation 15-6, Boards, Commissioners, and Committees: Procedure for Investigating Officers and Boards of Officers (Cl, 15, June 1981).

unit cohesiveness and effectiveness; the military had a distinct and overriding interest in deterring off-post assaults of this nature; and, that the military's interest could not have been adequately addressed by a civilian court. *See United States v. Lockwood*, 15 M.J. 1, 4 (CMA 1983), *citing Schlesinger v. Councilman*, 420 U.S. 738, 759-60 (1975). Accordingly, appellant's off-post assault of another servicemember was service connected and subject to trial by court-martial.[2]

We also note that appellant was convicted of two other offenses where service connection was not an issue. Although "pendent jurisdiction" is a concept which has never been directly embraced by the United States Court of Military Appeals, *see Lockwood*, 15 M.J. at 7, the advantages to an accused of disposing of all charges at a single trial have been recognized. *Id.* at 7-8; *United States v. Solorio*, 21 M.J. at 251-52. In this case appellant's assault is unlike the other offenses which he committed, but does bear a relationship to them in time and place. Given the military's interest in disposing of all known offenses at a single trial—an interest presumably shared by an accused—and the advantages to both the

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[2] Both the trial counsel, Captain Paul Koch, and the defense counsel, First Lieutenant Kevin Sugg, are to be commended for their excellent in-court presentations on the issue of service connection. Not only did they make persuasive, well-reasoned arguments in support of their respective positions, but they also provided the military judge with clear, concise briefs which summarized significant civilian and military decisions in the area of service connection. Captain Koch called four witnesses in developing the government's theory on why the charged assault was service connected, and Lieutenant Sugg called one witness, introduced a stipulation of expected testimony, and had appellant testify in an effort to show that the requisite service connection was lacking. While this ostensibly was a simple guilty plea case, counsel recognized that it involved an other than simple interlocutory question and prepared accordingly. Because of their professionalism, this court was able to decide the issue with all the relevant facts before it.

military and an accused of having offenses tried expeditiously, these considerations provide additional support for finding off-base offenses to be service connected.[3] "Under these circumstances, there exists . . . 'a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay,' and 'this interest, in turn, helps provide a basis for finding service connection for the off-base offenses.'" *United States v. Solorio*, 21 M.J. at 258.

The findings of guilty and the sentence are affirmed.

Senior Judge RABY and Judge ROBBLEE concur.

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

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[3] We recognize that some support can be found in military decisional law for the principle that service connection exists whenever a servicemember is the victim of an off-post offense. The argument is made that the victim's status generates the requisite military significance, and thus any reference to the various other *O'Callahan* factors is unnecessary. *See, e.g.*, United States v. Hedlund, 2 M.J. 11, 15-16 (CMA 1976) (Cook, J., dissenting); United States v. Everson, 41 CMR 70, 71 (CMA 1969). However, we believe that the Court of Military Appeals' most recent decision in the area of subject matter jurisdiction continues the requirement for an analysis of the *O'Callahan* and *Relford* criteria in resolving the service connection issue. United States v. Solorio, 21 M.J. at 255-57. Thus, we will wait for an appropriate case in which the sole service connection factor is that the victim was a servicemember to decide whether the victim's military status standing alone is sufficient to establish that an offense is service connected.

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No. 86-953

In the Supreme Court of the United States

OCTOBER TERM, 1986

RANDY W.J. ABELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether certain offenses charged against petitioner—sexual assaults on the dependent children of fellow servicemen—had a sufficient connection with the military to empower a court-martial to try him for those offenses.

2. Whether the military and civilian prohibitions against the sexual abuse of children gave petitioner sufficient notice that the conduct charged against him was criminal.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-12a) is reported at 23 M.J. 99. The opinion of the Army Court of Military Review (Pet. App. 13a-15a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on November 10, 1986 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

A general court-martial was convened by the Commander of the United States Army Aviation Center at Fort Rucker, Alabama, to try petitioner on three specifications of indecent acts with children under the age of 16, in violation of Article 134 of the Uniform Code of Military

Justice (UCMJ), 10 U.S.C. 934. At a pretrial hearing, the trial judge granted petitioner's motion to dismiss the specifications (Tr. 52; Pet. App. 2a-6a). Pursuant to Article 62, UCMJ, 10 U.S.C. (Supp. II) 862, the government appealed that decision to the Army Court of Military Review, which reversed the trial court's judgment and reinstated the specifications (Pet. App. 13a-15a). Petitioner thereafter sought review by the Court of Military Appeals, which granted review and affirmed the judgment of the Army Court of Military Review (Pet. App. 1a-12a). After the Court of Military Appeals denied petitioner's request for a stay of his trial, the court-martial reconvened on April 11, 1986, and petitioner was convicted on two of the three specifications. He was sentenced to confinement for 30 months, a reduction in rank, forfeiture of all pay, and a dishonorable discharge (*id.* at 2a). The convening authority subsequently approved the findings and sentence. Petitioner's appeal from his conviction is currently pending before the Army Court of Military Review.

1. From 1983 to 1986, petitioner, a military air traffic control tower operator, was stationed at Fort Rucker, Alabama, where he served as an instructor at the Army Aviation Center (DX G). The offenses at issue in this case occurred in petitioner's trailer home in an off-post trailer park between May and June 1985 (Pet. App. 3a; GX 2). Although it was not on military property, the trailer park was immediately adjacent to Fort Rucker. Approximately 80% of the trailer park residents were soldiers or their dependents (Pet. App. 3a, 7a, 10a, 14a; Tr. 18-19).

Petitioner's victims were two young girls, eight and nine years of age at the time the offenses occurred. One girl lived in the trailer park with her mother and her step-father, who was on active duty attending flight school at Fort Rucker (Tr. 85). The other girl lived with her mother in the same trailer park while her step-father was on a tour of duty in Korea (Pet. App. 6a, 11a; AX 2). Both victims were

friends of petitioner's daughter and frequently visited her at petitioner's trailer (Pet. App. 3a; GX 2; Tr. 85). Petitioner was also responsible, on occasion, for baby-sitting one of the victims (Tr. 86). During these visits, petitioner committed numerous acts of sexual abuse on the victims (GX 2). This pattern of abuse continued over a three-month period until petitioner's conduct was reported to civilian authorities (Pet. App. 3a-4a; Tr. 32).

In 1985, both victims and their families left Fort Rucker pursuant to military orders reassigning them to military installations in Washington and Texas. In October 1985, the local district attorney's office informed the Army that, in light of the geographic location of the victims and their families, it would defer prosecution of petitioner to the Army (Pet. App. 4a; AX 2, encl. 1).[1] Three days later, the Army charged petitioner with the child abuse offenses (Tr. 21).

2. a. Before trial, petitioner moved to dismiss the specifications on the ground that the court-martial lacked jurisdiction over the offenses under *Relford* v. *Commandant*, 401 U.S. 355 (1971). The judge conducted an evidentiary hearing on the motion. Evidence was introduced regarding the off-post housing situation at Fort Rucker, which showed that service-members were authorized to live at the trailer court where petitioner and the victims lived (Tr. 15-16). Evidence was also adduced concerning the inability of the district attorney's office to bring petitioner to trial in civilian court, because the district attorney lacked the subpoena power necessary to compel the victims to return to Alabama (Tr. 22; GX 1). For petitioner to be tried in the local criminal courts, the evidence showed, the victims and their families would have to pay their own travel and lodging expenses for the grand jury and trial proceedings (GX 1).

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[1] The letter from the district attorney's office and a stipulation of expected testimony from the assistant district attorney were introduced during the hearing on petitioner's motion (GX 1).

b. After hearing the evidence, the trial judge granted petitioner's motion to dismiss and entered findings on the matter (Pet. App. 2a-6a). The court ruled that the offenses were not "service connected" because there was no military relationship between petitioner and the victims' fathers (*e.g.*, they were not members of the same unit and did not perform their military duties together); because there was no on-post "contact" or "activity" between petitioner and his victims; and because there were no charges against petitioner stemming from on-base conduct (Pet. App. 5a-6a; Tr. 51-52).[2]

3. On the government's appeal, the Army Court of Military Review reversed the trial court's judgment and reinstated the charges (Pet. App. 13a-15a). In concluding that the offenses were "service connected," the Court of Military Review noted several factors: the offenses occurred in close proximity to Fort Rucker; the victims were military dependents; petitioner and the victims resided in the same trailer park; and the trailer park primarily served military families from the base. Relying on the Court of Military Appeals' decision in *United States* v. *Solorio*,

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[2] Notably, however, the trial judge stated (Pet. App. 4a-5a; Tr. 50):

> In my opinion, it is a reasonable and logical assumption that the commission of a series of indecent acts by a soldier on the children of other soldiers in his quarters located adjacent to a military installation has a direct, clear and measurable impact on the morale, reputation and integrity of the installation. I believe that it is also reasonable to assume the morale of soldiers and their dependents, particularly those living in the same housing area as an alleged offender would suffer even more if the appropriate civilian or military authorities did not take some action. It is apparent to me that civilian authorities never intended to prosecute Sergeant Abell.

The trial judge did not have the benefit of the Court of Military Appeals' decision in *United States* v. *Solorio*, 21 M.J. 251 (1986), cert. granted, No. 85-1581 (June 16, 1986), which was published 13 days after the trial judge's ruling.

21 M.J. 251 (1986), cert. granted, No. 85-1581 (June 16, 1986), the Court of Military Review ruled that petitioner could be court-martialed for the alleged offenses (Pet. App. 15a).

4. Petitioner thereafter sought review by the Court of Military Appeals. After granting review, that court also found that the offenses were "service connected" (Pet. App. 1a-12a). At the outset, the court held that the question whether a particular crime is "service connected" is subject to de novo consideration by an appellate court (*id.* at 8a). The court explained that analyzing the factors identified in *Relford* and *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), requires a "considered judgment, not mathematical calibration" (Pet. App. 11a). In ruling that the offenses charged against petitioner could be tried by court-martial, the court of appeals relied on a number of factors (*id.* at 10a-11a): the crimes occurred immediately adjacent to a military installation; the civilian authorities deferred prosecution of petitioner to the military; and the sexual abuse of the dependent children of fellow servicemembers has a "clearly deleterious" effect on the military performance of the servicemember parents and on military morale and cohesiveness. Considering these factors in light of *O'Callahan, Relford, Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), and its recent decision in *Solorio*, the Court of Military Appeals concluded that petitioner's crimes were properly triable by a court-martial (Pet. App. 11a-12a). As the court summarized, "[a]lthough the price of service to one's country is high, these decisions do not dictate that it further include the unreasonable exposure of a soldier's family to unsanctioned crimes committed within the military community by fellow servicemembers" (*ibid*).[3]

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[3] On January 12, 1987, this Court denied petitioner's motion to expedite consideration of the petition and to set the case for argument in tandem with *Solorio* v. *United States*, cert. granted, No. 85-1581 (June 16, 1986).

DISCUSSION

Petitioner contends that the military courts were not authorized to try him for his off-base crimes because the offenses were not "service connected" under *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). Petitioner also argues that trying him before a court-martial violated the Due Process Clause by denying him fair warning that he was subject to prosecution in the military courts.[4] The questions presented in this case are not materially different from the questions in *Solorio* v. *United States*, cert. granted, No. 85-1581 (June 16, 1986). Both cases involve offenses committed against the minor dependents of fellow servicemembers, both cases involve off-base crimes, and both cases involve a decision by civilian authorities to defer prosecution of off-base crimes to the military. The petition in this case should therefore be disposed of in light of the Court's decision in *Solorio*.

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[4] Petitioner did not raise his second claim in either of the courts below. He therefore may not assert it for the first time in this Court. See, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *Solorio* v. *United States*, cert. granted, No. 85-1581 (June 16, 1986).

Respectfully submitted.

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